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No. 86-1883

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1986

TRIPLE "A" MACHINE SHOP, INC.,
*Petitioner,*

VS.

SOUTHWEST MARINE, INC.,
*Respondent.*

## SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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### I. SOUTHWEST'S MISSTATEMENT OF THE RECORD BELOW CANNOT FORECLOSE REVIEW BY THIS COURT

Southwest would foreclose this Court's review of Triple A's petition by asserting that Triple A consented to NASSCO's assignment of its—NASSCO's—rights to Southwest. But four circuit judges have declared that Southwest's assertion is untrue:

> The assignment made by National Steel & Shipbuilding Co. to Southwest Marine was not an assignment that was authorized, concurred in or in any way made possible by Triple 'A'. There was no way that the defendants could "collectively" permit Southwest Marine to use the facility. (App. G at 27-28)

Southwest knows this is so. Triple A did not give NASSCO consent to assign its rights to Southwest as, indeed, it was not Triple A's to give. Triple A had no power to grant or withhold consent to NASSCO's assignment of its rights to Southwest. Paragraph 18 of the User's Agreement provided: "RIGHT TO

ASSIGN: Neither this Agreement nor any interest therein shall be transferred or assigned by any and all of the Participating Companies except with the written consent *of the District.*" (C.R. 1) That consent was granted by the Port District—not by Triple A—in Resolution No. 78144 entitled "Consent to Agreement of Partial Assignment *between National Steel and Shipbuilding Company and Southwest Marine, Incorporated.*" (R.T. 1034-36) This is why NASSCO's witness testified at trial, under cross-examination by Southwest's attorney, as follows: "Q: Did Southwest ultimately gain access to the graving dock *as a result of some decision made by NASSCO?* A: In a very limited sense, *yes.*" (R.T. 1099) Thus it is clear: NASSCO assigned rights to Southwest with the required consent of the Port District. There is simply no evidence that Triple A approved or disapproved the assignment or possessed the power to do so.

Southwest's briefs to the Court of Appeals acknowledge this, as they must: "SWM's application for preliminary injunction in this action was denied. Thereafter, *NASSCO and SWM reached an agreement* whereby SWM was granted the right to use the dock through a series of partial assignments." (AOB at 3) Similarly, in its opposition to Triple A's successful motion for summary judgment, Southwest acknowledged: "After this Court denied Southwest's requests for injunctive relief, *NASSCO* voluntarily made the Graving Dock available to Southwest under a series of partial assignments." (C.R. 319) Moreover, it was NASSCO—not Triple A—that pled the affirmative defense that it (NASSCO, not Triple A) "offered to partially reassign to plaintiff *NASSCO's* right to use the Graving Dock." (C.R. 46) The letter containing NASSCO's offer makes clear that it was unilateral and not conditioned upon the consent of Triple A or any other user. (*Id.*)

In the face of these prior admissions, it is understandable that Southwest nowhere refutes this fact. The four dissenting judges took care to observe that "Triple A made crystal clear the error which the court's earlier opinion had made" and that "Southwest Marine did not attempt to dispute Triple A's refutation of this mistake." Instead, Southwest is content to use what four circuit judges described as a "substantial miscarriage of justice" (A-27) to eclipse the record from this Court's eyes. Because Southwest did not prevail against Triple A, *Kentucky v. Graham,* 473 U.S.

159 (1985) and *Supreme Court of Virginia v. Consumers Union,* 446 U.S. 719 (1980) mandate summary reversal. Indeed, by ignoring *both* the record *and* this Court's precedents which govern that record, the court below "has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 17(a). Contrary to what Southwest has suggested, no lower court's decision can be rendered certiorari-proof by a "finding" that is bereft of support in the record.

## II. EVEN IF SOUTHWEST HAD NOT MISSTATED THE RECORD BELOW, CERTIORARI IS NECESSARY TO ELIMINATE A PRECEDENT THAT IS BOTH WRONG AND DANGEROUS

But whether NASSCO's assignment of its rights to Southwest had or even could have the consent of Triple A is, in any event, beside the point. It may even be assumed, contrary to all the evidence, that Triple A somehow "consented" to NASSCO's assignment. The Court should nonetheless reverse for consideration in light of *Hanrahan v. Hampton,* 446 U.S. 754 (1980) and *Ruckelshaus EPA v. Sierra Club,* 463 U.S. 680 (1983), for *Hanrahan* states a plaintiff is entitled to attorneys' fees only if he "has established his entitlement to some relief on the merits of his claims, either in the trial court or on an appeal" (446 U.S. at 757) and *Ruckelshaus* states the authorities "have never gone so far as to force a vindicated defendant [even a defendant who grants plaintiff what plaintiff wants *pendente lite*] to pay the plaintiff's legal expenses." 463 U.S. at 684-85.

If the Court does not summarily reverse in light of *Hanrahan* and *Ruckelshaus* or *Kentucky* and *Virginia,* it should at least grant certiorari to decide the question left open in *Maher v. Gagne,* 448 U.S. 122 (1980) and *Hewitt v. Helms,* ___ U.S. ___, 107 S.Ct. 2672 (1987). Thus in *Maher,* the Court held that a consent decree obtained by plaintiff rendered plaintiff a "prevailing party" under 42 U.S.C. § 1988 because a plaintiff who obtains relief by settlement "is deemed to have prevailed despite the absence of a formal judgment in his favor." *Hewitt,* 107 S.Ct. at 2676 (discussing *Maher*). But how far do *Maher* and *Hewitt* go? Do they mean—as Southwest contends—that plaintiff can lose to defendant on the merits but recover attorneys' fees from

defendant anyway merely because defendant previously gave plaintiff the benefit of the doubt *pendente lite*? We think not. While the presence of a "formal judgment in his favor" may not be the *sine qua non* of plaintiff's entitlement to attorneys' fees, the absence of a formal judgment in defendant's favor is.[1]

The majority and the dissent in *Hewitt* agreed not to decide the extent of the "catalyst" doctrine on the record before them. The Court declared: "We need not decide the circumstances, if any, under which this 'catalyst' theory could justify a fee award under § 1988." 107 S.Ct. at 2677. The dissent also believed that, because the *Hewitt* record was inadequate, "the Court wisely leaves for another day any discussion of the general circumstances under which action 'catalyzed' by a lawsuit may be characterized as informal relief for purposes of [an award of attorneys' fees under] § 1988." 107 S.Ct. at 2679.

But the record here presents the Court with a perfect opportunity to resolve the important question left open in *Hewitt*. It was unclear in *Hewitt* whether plaintiff's litigation "catalyzed" a regulatory change which benefitted plaintiff. But that evidentiary shortcoming is not present here. Thus either (1) Judges Noonan, Sneed, Goodwin and Anderson were right (meaning Triple A did not consent to NASSCO's assignment) and this Court should summarily reverse in light of *Hanrahan, Ruckelshaus, Kentucky* and *Virginia* or (2) Judges Canby and Reinhardt were right (meaning Triple A did consent to NASSCO's assignment) and the question left open in *Maher* and *Hewitt* is squarely presented for decision.

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[1] In holding otherwise, the court below is not only in "all but direct defiance of the Supreme Court" (A-25) but is also in direct conflict with the decision of another panel of the Ninth Circuit in *Cal. Ass'n of Physically Handicapped v. F.C.C.*, 721 F.2d 667 (9th Cir. 1983). The court there held that "a plaintiff cannot be a prevailing party [for attorney's fees purposes] where a defendant's action is only gratuitous" (721 F.2d at 672) and defined "gratuitous" as follows: "If it has been judicially determined that defendants' conduct, however beneficial it may be to plaintiffs' interests, is not required by law, then defendants must be held to have acted gratuitously and plaintiffs have not prevailed in a legal sense." *Id.*

That question—whether a plaintiff who "catalyzes" a temporary concession from a defendant but who ultimately loses to defendant on the merits may nonetheless collect attorneys' fees from defendant—is surely important. "It hardly seems necessary to point out there is an overriding public interest in settling and quieting litigation" (*Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943 (9th Cir. 1976)) and this policy is of special importance in antitrust litigation. *Conrac Corp. v. American Tel. & Tel. Co.*, 546 F.Supp. 429 (S.D.N.Y. 1982). Yet the only possible basis for a court's imposition of attorneys' fees upon a vindicated defendant is that defendant, though rightly believing himself innocent of plaintiff's charge, voluntarily mitigated plaintiff's "damages" in partial compromise of the litigation. If that is the law, what rational defendant would voluntarily accommodate plaintiff's demands *pendente lite?* Intransigence would be the better course.

Moreover, the risk is real. Before the ink dried in *Hewitt*, Southwest seized upon dictum therein to support the perverse holding of the court below. Other unsuccessful plaintiffs will surely follow—unless the Court uses this opportunity to prevent it. Triple A fully appreciates that successful plaintiffs are entitled to recover their attorney's fees for the salutary purpose of encouraging private enforcement of the antitrust laws. But requiring the vindicated defendant to finance plaintiff's meritless lawsuit against him does not serve that end.

Respectfully submitted,

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